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Supreme Court, U.S.
FILED
FEB 28 2005
OFFICE OF THE CLERK

No. 04-1011

In The Supreme Court of the United States

ALBERT L. FREEMAN,

Petitioner,

v.

DUKE POWER COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Fourth Circuit conclude correctly, based on well-established precedent, that a settlement agreement entered as a result of a grievance brought by a union pursuant to the terms of a collective bargaining agreement is a labor "contract" within the meaning of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (hereinafter "LMRA Section 301")?

2. Did the Fourth Circuit conclude correctly, based on well-established precedent, that Petitioner Albert L. Freeman's claims for breach of contract, wrongful discharge and tortious interference with contract were completely preempted by LMRA Section 301?

3. Did the Fourth Circuit conclude correctly, based on well-established precedent, that Petitioner Albert L. Freeman's claims for breach of contract and wrongful discharge were barred by the six-month statute of limitations for "hybrid" LMRA Section 301 claims pursuant to *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158, 103 S.Ct. 2281, 2287 (1983)?

4. Did the Fourth Circuit conclude correctly, based on well-established precedent, that Petitioner Albert L. Freeman's claim for tortious interference with contract failed to state a claim upon which relief could be granted under LMRA Section 301?

5. Did the Fourth Circuit conclude correctly, based on well-established precedent, that Petitioner Albert L. Freeman's claim for unfair and deceptive trade practices failed to state a claim upon which relief could be granted under North Carolina law?

CORPORATE DISCLOSURE STATEMENT

Respondent "Duke Power Company" is an operating unit of respondent Duke Energy Corporation, is not a separate corporate entity and has no stock. Accordingly, no publicly-held company owns 10% or more of its stock.

Respondent Duke Energy Corporation is a publicly-held company. Duke Energy Corporation has no parent company and no publicly-held company owns 10% or more of its stock.

Respondents Cindy Thaxton and George Kwascha are individuals.

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STATEMENT OF THE CASE

From 1983 until July of 1999, petitioner Albert L. Freeman ("Freeman") was employed by respondents Duke Power Company and Duke Energy Corporation (collectively "Duke") as a "lineman" in Burlington, North Carolina. *See* Petition Appendix ("Petition Appx.") B at p. 2b. Freeman was a member of Local Union 962, International Brotherhood of Electrical Workers (hereafter the "Union"), which had, at all relevant times, various collective bargaining agreements with Duke (collectively the "CBA"). *Id.*

On or around January 26, 1994, Freeman was suspended and then discharged from his employment as a lineman for removing a service drop and meter and disconnecting service to a customer without authorization from Duke, while moonlighting as an electrical contractor. *Id.* at p. 3b. The Union filed a grievance on behalf of Freeman under the "Grievances" provision of the then existing CBA. *Id.* Prior to the referral of this grievance to arbitration as provided by the CBA, Duke and the Union settled the grievance and Duke, the Union, and Freeman entered into an agreement entitled "Grievance Resolution." *Id.* Pursuant to the "Grievance Resolution," Duke, the Union, and Freeman agreed, *inter alia*, that Duke would reinstate Freeman with no loss of service under the CBA, but with no back pay; the Union agreed to withdraw the grievance; and Freeman agreed not to engage, directly or indirectly, in the business of electrical contracting while employed with Duke. *Id.* The Grievance Resolution provided that Duke could discharge Freeman if he engaged in electrical contracting and that the discharge decision would be final and would not be subject to the grievance procedures of the CBA in effect at the time of any future discharge. *Id.*

In June 1996, Duke Power suspended and proposed to discharge Freeman a second time, asserting that Freeman violated the Grievance Resolution by engaging in electrical contracting. *Id.* Freeman asserted that he did not violate the Grievance Resolution. *Id.* In settling the dispute, the Union, Duke, and Freeman entered into an Amendment to the Grievance Resolution (the "Amendment") on or about July 3, 1996. *Id.* The Amendment prohibited Freeman from being or becoming employed on a full- or part-time basis with any entity engaged in the business of electrical contracting. *Id.* In the Amendment, Duke agreed not to terminate Freeman for the then current violation of the Grievance Resolution, and Freeman agreed not to engage in the business of electrical contracting in the future. *Id.* The Amendment provided that Duke could terminate Freeman's employment if he violated the Amendment and that such termination would be final and would not be subject to the arbitration or grievance procedures under the CBA. *Id.*

In July of 1999, Duke suspended Freeman and then terminated Freeman's employment for breaching the terms of the Grievance Resolution and the Amendment by engaging in the business of electrical contracting. *Id.* The Union did not file a grievance pursuant to the CBA on behalf of Freeman regarding his July 1999 termination. *Id.* at p. 4b.

On or about June 30, 2000, Freeman filed a complaint against Duke in the General Court of Justice, Alamance County, North Carolina asserting state law claims for breach of employment contract, wrongful discharge, bad faith discharge and violation of the North Carolina Constitution. *Id.* Duke removed the action to federal court on the ground that Freeman's state law claims were completely

preempted by LMRA Section 301, 29 U.S.C. § 185(a). Duke moved to dismiss Freeman's claims; Freeman moved to remand. *Id.*

On or about June 28, 2002, Freeman filed a separate action in the General Court of Justice, Alamance County, North Carolina, against respondents Cindy Thaxton ("Thaxton") and George Kwascha ("Kwascha"), two management employees at Duke. *Id.* This action asserted claims for tortious interference with contract and unfair and deceptive trade practices. *Id.* Thaxton and Kwascha removed this action to federal court based on complete preemption by LMRA Section 301 and moved to dismiss. Freeman moved to remand. *Id.*

The District Court granted both motions to dismiss and denied Freeman's motions to remand. *See* Petition Appx. A. Freeman appealed to the United States Court of Appeals for the Fourth Circuit.

On September 27, 2004, the Fourth Circuit, by unpublished *per curiam* opinion, affirmed the District Court in all respects. *See Freeman v. Duke Power Co.*, 114 Fed. Appx. 526 (4th Cir. 2004) (per curiam) (unpublished); Petition Appx. B. As a preliminary matter, the Fourth Circuit concluded that, based on established precedent, the Grievance Resolution and the Amendment were labor "contracts" within the meaning of LMRA Section 301 because they "derive[d] their 'entire vitality and legitimacy' from the CBA." *Freeman*, 114 Fed. Appx. at 531-32 (quoting *Davis v. Bell Atlantic-West Virginia, Inc.*, 110 F.3d 245, 248 (4th Cir. 1997)); Petition Appx. B at pp. 6b-7b. The Fourth Circuit concluded further that Freeman's breach of contract and wrongful discharge claims against Duke and his tortious interference claim against Thaxton and Kwascha were completely preempted by LMRA

Section 301. *Freeman*, 114 Fed. Appx. at 532-33; Petition Appx. B at pp. 8b-9b. Accordingly, the Fourth Circuit held that the District Court properly exercised subject matter jurisdiction over both actions and affirmed the District Court's denial of the motions to remand. *Id.*

The Fourth Circuit treated the breach of contract and the wrongful discharge claims against Duke as LMRA Section 301 claims. *Freeman*, 114 Fed. Appx. at 533 (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 105 S.Ct. 1904, 1915 (1985)); Petition Appx. B at p. 10b. The Fourth Circuit then considered whether these claims were timely under LMRA Section 301. *Id.* As directed by this Court in *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158, 103 S.Ct. 2281, 2287 (1983), the Fourth Circuit applied the six-month statute of limitations found in Section 10(b) of the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 160(b), and held that these claims against Duke were time barred. *Freeman*, 114 Fed. Appx. at 533-34 (citing *DelCostello*, 462 U.S. at 158, 103 S.Ct. at 2287); Petition Appx. B at pp. 10b-11b. It further held that Freeman's claims against Duke for "bad faith discharge" and for violation of the North Carolina Constitution failed to state claims under North Carolina law.[1] *Freeman*, 114 Fed. Appx. at 534-35; Petition Appx. B at pp. 11b-12b.

As to the claims against Thaxton and Kwascha, the Fourth Circuit concluded that the tortious interference with contract claim did not state a claim upon which relief could be granted under LMRA Section 301. *Freeman*, 114

[1] Freeman does not mention either the "bad faith discharge" claim or the claim for alleged violation of the North Carolina Constitution in his Petition and does not assert that the Fourth Circuit erred in affirming the dismissal of these claims.

Fed. Appx. at 535 (following *International Union, United Mine Workers of Am. v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992)); Petition Appx. B at pp. 12b-13b. Finally, the Fourth Circuit concluded that Freeman's claim for unfair and deceptive trade practices against Thaxton and Kwascha did not state a valid claim under North Carolina law. *Freeman*, 114 Fed. Appx. at 535; Petition Appx. B at pp. 13b-14b.

The Fourth Circuit, in reliance on well-established precedent from this Court, the Fourth Circuit and other federal Courts of Appeals, affirmed the decision of the District Court in all respects. The Fourth Circuit subsequently denied Freeman's petitions for rehearing and for rehearing *en banc*. *See* Petition Appx. C.

REASONS FOR DENYING THE PETITION

The decision of the Fourth Circuit does not conflict with a decision of this Court or any federal Court of Appeals. In rendering its decision in this case, the Fourth Circuit relied upon and applied clear, well-established and unquestioned Fourth Circuit precedent as well as well-established precedent from this Court and from other federal Courts of Appeals. In short, there is no compelling reason for this Court to review the Fourth Circuit's decision.

I. THE DECISION OF THE FOURTH CIRCUIT DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

The decision of the Fourth Circuit does not conflict with any decision of this Court. There are three decisions

of this Court that are explicitly or implicitly implicated in Freeman's Petition: *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425 (1987); *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281 (1983); and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904 (1985). As discussed in detail below, the Fourth Circuit's decision in this case does not conflict in any way with any of these decisions.

A. The Decision Of The Fourth Circuit Does Not Conflict With This Court's Decision In *Caterpillar, Inc.*

Freeman specifically asserts that the Fourth Circuit's decision conflicts with this Court's decision in *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425 (1987). *See* Petition pp. 13-15. However, Freeman does not discuss or analyze the facts or holding of *Caterpillar, Inc.* or set forth any argument regarding the alleged conflict. Rather, the Petition states simply that claims based on an "independent" agreement are not preempted by LMRA Section 301.

In *Caterpillar, Inc.*, the plaintiffs alleged that while they were management employees and, therefore, not union members or subject to any collective bargaining agreement, Caterpillar entered into individual employment agreements with them. *See Caterpillar, Inc.*, 482 U.S. at 388-89, 107 S.Ct. at 2427-28. After they were demoted to positions within the bargaining unit and then laid off, the plaintiffs brought suit in California state court for breach of their individual employment agreements. *Id.* at 390, 107 S.Ct. at 2428. Caterpillar removed the action to federal court asserting complete preemption by LMRA Section 301. *Id.* This Court held that a claim for breach of an individual employment agreement, which was brought

by an employee who was not subject to any collective bargaining agreement at the time the individual agreement was executed, and the resolution of which was not substantially dependent on analysis of a collective bargaining agreement, was not preempted by LMRA Section 301. *Id.* at 394-98, 107 S.Ct. at 2430-33.

In the instant case, unlike the situation in *Caterpillar, Inc.*, Freeman was, at all times, a member of the Union and subject to the CBA between the Union and Duke. The Grievance Resolution and Amendment were entered into by Duke, Freeman and the Union to resolve a grievance brought by the Union on Freeman's behalf pursuant to the CBA. As distinguished from *Caterpillar, Inc.*, the Grievance Resolution and Amendment derive their very existence from the CBA.

In its decision, the Fourth Circuit squarely addressed this issue and distinguished *Caterpillar, Inc.* as follows:

> Although disputes arising over independent employment contracts unrelated to a CBA are not preempted by § 301 of the LMRA, *see Caterpillar Inc. v. Williams,* 482 U.S. 386, 394-95, 107 S.Ct. 2425, 2430-31, 96 L.Ed. 2d, 2430-31 (1987), the Grievance Resolution and the Amendment are not independent of the CBA. The employees in *Caterpillar* had entered separate management contracts and only later became subject to a CBA when they were demoted. Their state law action was based on the management contracts, not anything derivative of the CBA, and thus was not preempted by the LMRA. *Id.* at 395 & n. 9, 107 S.Ct. at 2425. The same cannot be said in the instant case, as the Grievance Resolution and Amendment derive their "entire vitality and legitimacy" from the CBA. *Davis,* 110 F.3d at 248.

Freeman, 114 Fed. Appx. at 531-532; Petition Appx. B at p. 7b. Freeman offers no argument on how the Fourth Circuit allegedly erred when it discussed and distinguished *Caterpillar, Inc.* This Court's decision in *Caterpillar, Inc.* is distinguishable and the Fourth Circuit's decision does not conflict with *Caterpillar, Inc.* in any way.

B. The Decision Of The Fourth Circuit Does Not Conflict With This Court's Decision In *DelCostello*.

Freeman's Petition could be construed to suggest that the Fourth Circuit's decision conflicts with this Court's opinion in *DelCostello* due to application of the six-month statute of limitations. *See* Petition p. 15. It is well established that, where a union has agreed to waive its right to grieve or otherwise challenge a discharge under a labor contract, the waiver acts as a final resolution of the matter. *See Bowen v. United States Postal Service*, 459 U.S. 212, 226, 103 S.Ct. 588, 596 (1983). This Court, however, has "recognized that this rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure ... breach[es] its duty of fair representation." *DelCostello*, 462 U.S. at 164, 103 S.Ct. at 2290 (citations omitted). As a result, this Court recognized "hybrid" LMRA Section 301 claims wherein "an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding." *Id.* at 165, 103 S.Ct. at 2291. Such "hybrid" LMRA Section 301 claims borrow the six-month statute of limitations found in Section 10(b) of the NLRA, 29 U.S.C. § 160(b). *Id.* at 171, 103 S.Ct. at 2294.

The Fourth Circuit determined correctly that, due to the waiver of the grievance provisions of the CBA in the Grievance Resolution and Amendment, any LMRA Section 301 claim was governed by the six-month statute of limitations for hybrid LMRA Section 301 claims. *Freeman*, 114 Fed. Appx. at 533-34 (citing *DelCostello*, 462 U.S. at 171, 103 S.Ct. at 2294); Petition Appx. B at pp. 10b-11b. The Fourth Circuit's application of *DelCostello* in this case was correct and not in conflict with any decision of this Court.

C. The Decision Of The Fourth Circuit Does Not Conflict With This Court's Decision In *Allis-Chalmers, Corp.*

Freeman asserts that the Fourth Circuit's decision below was inconsistent with this Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211, 105 S.Ct. 1904, 1911 (1985). *See* Petition p. 15. Freeman argues that, because the Grievance Resolution and Amendment waived his access to the grievance provisions of the CBA, those agreements should not be considered labor contracts within the meaning of LMRA Section 301. *See* Petition p. 15. Freeman suggests that *Allis-Chalmers Corp.* stands for the proposition that in order to be a labor contract, an agreement must allow access to arbitration. *See id.*

Allis-Chalmers Corp. does not state or imply that an agreement must contain an arbitration provision in order to be a labor contract within the meaning of LMRA Section 301. To the contrary, *Allis-Chalmers Corp.* specifically states that "Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract." *Allis-Chalmers Corp.*, 471 U.S. at 211-12, 105 S.Ct. at 1911-12.

Contrary to Freeman's assertion, the Union's waiver of the grievance provisions of the CBA in the Grievance Resolution and Amendment does not render those agreements mere state law contracts. Rather, the waiver rendered Duke's decision to terminate Freeman a "final" decision for purposes of the CBA. *See Bowen*, 459 U.S. at 226, 103 S.Ct. at 596. Accordingly, Freeman's remedy was a hybrid LMRA Section 301 action, as discussed by this Court in *DelCostello*, 462 U.S. at 165, 103 S.Ct. 2291, *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967), and other cases.

The Fourth Circuit's decision does not conflict in any way with this Court's decision in *Allis-Chalmers Corp.* or any other case.

II. THERE IS NO CIRCUIT SPLIT ON THE QUESTIONS PRESENTED.

The decision of the Fourth Circuit below does not conflict with the decisions of any other Court of Appeals on the issues presented.

There is no split among the Courts of Appeals regarding the fact that a settlement agreement entered to resolve a grievance initiated by a union pursuant to the terms of a collective bargaining agreement is a labor "contract" within the meaning of LMRA Section 301. The various Courts of Appeals agree on this point, even though they use slightly different labels to describe the agreements at issue.

In its decision, the Fourth Circuit characterized the Grievance Resolution and Amendment as labor contracts within the meaning of LMRA Section 301 because they

"derive[d] their 'entire vitality and legitimacy' from the CBA." *Freeman*, 114 Fed. Appx. at 531-32 (quoting *Davis*, 110 F.3d at 248); Petition Appx. B at pp. 6b-7b. The Sixth Circuit and the Third Circuit have reached similar conclusions with regard to grievance settlement agreements. *See Jones v. General Motors Corp.*, 939 F.2d 380, 382-83 (6th Cir. 1991) (settlement agreement arrived at by virtue of the grievance process established by a collective bargaining agreement was a labor contract within the meaning of Section 301 of LMRA); *United Mine Workers of Am. v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096-98 (3rd Cir. 1977) (same); *see also Duerr v. 3M*, 101 F. Supp. 2d 1057, 1060-61 (N.D. Ill. 2000) (same); *Amalgamated Meat Cutters and Butcher Workmen of N. Am., Local 195, AFL-CIO v. M. Feder & Co.*, 234 F. Supp. 564, 548 (E.D. Pa. 1964) (same).

Other Courts of Appeals, including the Fifth, Sixth, Seventh, Eighth and District of Columbia Circuits, have uniformly held that settlement agreements arising out of grievances, which are typically characterized as "last chance agreements," are labor contracts within the meaning of LMRA Section 301. *See Int'l Union of Operating Eng'rs v. Cooper Natural*, 163 F.3d 916, 919 (5th Cir.), *cert. denied*, 528 U.S. 812, 120 S.Ct. 45 (1999) (last chance agreement is labor contract for purposes of Section 301 of LMRA); *Coca-Cola Bottling Co. of St. Louis v. Teamsters Local Union No. 688*, 959 F.2d 1438 (8th Cir. 1992) (same); *United States Dep't of the Air Force v. Fed. Labor Relations Auth.*, 949 F.2d 475, 478 (D.C. Cir. 1991) (same); *Tootsie Roll Indus., Inc. v. Local Union No. 1, Bakery, Confectionary and Tobacco Workers' Int'l Union*, 832 F.2d 81, 82 (7th Cir. 1987) (same); *Bakers Union Factory No. 326 v. ITT Cont'l Baking Co., Inc.*, 749 F.2d 350, 354 (6th Cir. 1984)

(same); *see also Cotter v. DaimlerChrysler Corp.*, 87 F. Supp. 2d 746, 757 (E.D. Mich. 2000) (same).

The Fourth Circuit's decision is wholly consistent with the vast body of well-established precedent that a settlement agreement entered into to resolve a grievance initiated by a union pursuant to the terms of a collective bargaining agreement is a labor contract within the meaning of LMRA Section 301. Further, there is no split among the Courts of Appeals regarding any other question presented in the instant action.

III. THIS CASE DOES NOT PRESENT ANY QUESTION OF EXCEPTIONAL IMPORTANCE TO LABOR LAW JURISPRUDENCE WHICH SHOULD BE DECIDED BY THIS COURT.

In rendering its decision, the Fourth Circuit applied well-established precedent from this Court, the Fourth Circuit and the other Courts of Appeals.

As discussed in Section II, *supra*, it is well established in the Fourth Circuit and the other Courts of Appeals that agreements such as the Grievance Resolution and the Amendment are labor contracts within the meaning of LMRA Section 301.

The case law from this Court firmly establishes that a state law claim for breach of a labor contract and any other claim the resolution of which requires the interpretation of a labor contract are completely preempted by LMRA Section 301. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877 (1988); *Allis-Chalmers Corp.*, 471 U.S. at 220, 105 S.Ct. at 1915; *Caterpillar, Inc.*, 482 U.S. at 393, 107 S.Ct. at 2430; *Franchise Tax Bd. v.*

Constr. Laborers Vacation Trust, 463 U.S. 1, 24, 103 S.Ct. 2841, 2854 (1983); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n Of Machinists & Aerospace Workers*, 390 U.S. 557, 88 S.Ct. 1235 (1968). Further, it is firmly established that state law claims that are completely preempted by LMRA Section 301 "must either be treated as a § 301 claim . . . or dismissed as preempted by federal labor-contract law." *Allis-Chalmers Corp.*, 471 U.S. at 220, 105 S.Ct. at 1915.

It is well-established precedent in this Court that, where a decision is "final" under a labor contract, either by operation of the grievance procedure or by waiver, a plaintiff may only pursue a "hybrid" LMRA Section 301 claim. *See DelCostello*, 462 U.S. at 165, 103 S.Ct. at 2291; *Vaca*, 386 U.S. 171, 87 S.Ct. 903. Further, it is beyond question that "hybrid" LMRA Section 301 claims are subject to the six-month statute of limitations found in Section 10(b) of the NLRA, 29 U.S.C. § 160(b), and that claims bought after the expiration of this statute of limitations fail as matter of law. *DelCostello*, 462 U.S. at 171, 103 S.Ct. at 2294.

Fourth Circuit and other Courts of Appeals have repeatedly held that a claim against a manager, supervisor or other third-party for tortious interference with a labor contract is preempted by LMRA Section 301. *See Covenant Coal Corp.*, 977 F.2d at 897 (claim for tortious interference with labor contract preempted by LMRA Section 301); *Steinbach v. Dillon Cos.*, 253 F.3d 538, 540 (10th Cir. 2001) (same); *Kimbro v. Pepsico, Inc.*, 215 F.3d 723, 727 (7th Cir. 2000) (same); *Hillard v. Dobelman*, 774 F.2d 886, 887 (8th Cir. 1985) (same).

Freeman specifically argues in his Petition that the question of whether the Grievance Resolution and the

Amendment are "riders" to the CBA, "last chance agreements" or mere state law contracts is a question of exceptional importance to labor law jurisprudence that should be decided by this Court. *See* Petition pp. 15-16. As discussed above, however, it is firmly established in the Courts of Appeals that a settlement agreement entered into to resolve a grievance initiated by a union pursuant to the terms of a collective bargaining agreement is a labor contract within the meaning of LMRA Section 301, regardless of the semantics of labeling such an agreement a "rider to the CBA" or a "last chance agreement." *See* Section II, *supra*. This issue is well settled in labor law jurisprudence and need not be considered by this Court.

The case at bar presents no new issues. The issues raised in the Petition are firmly established in labor law jurisprudence, through the decisions of this Court and the Courts of Appeals, and should not be disturbed. There is simply no unsettled question of exceptional importance to labor law jurisprudence presented in this case.

IV. THERE IS NO INTERNAL CONFLICT WITH THE CASE LAW OF THE FOURTH CIRCUIT ON THE QUESTIONS PRESENTED.

In finding that Freeman's claim against Thaxton and Kwascha for tortious interference with contract was preempted, the Fourth Circuit applied "controlling and unquestioned circuit precedent." *Freeman*, 114 Fed. Appx. at 535 (citing *Covenant Coal Corp.*, 977 F.2d at 897); Petition Appx. B at pp. 12b-13b. Nevertheless, Freeman asserts as a basis for review by this Court that the Fourth Circuit's decision below conflicted with the Fourth Circuit's previous opinion in *Jackson v. Kimel*, 922 F.2d 1318 (4th Cir. 1993). *See* Petition pp. 16-19.

The Fourth Circuit's decision in *Jackson* is distinguishable and inapplicable in this case. The issue in *Jackson* was whether a state law claim for intentional infliction of emotional distress against a former supervisor was preempted by LMRA Section 301. The Fourth Circuit held that such a claim was not preempted because the supervisor's conduct "if it occurred as alleged, [was] wrongful regardless of whether it was authorized by the collective bargaining agreement." *Jackson*, 992 F.2d at 1326. Interpretation of the relevant labor contract was not necessary to establish any element of the plaintiff's claim.

Unlike *Jackson*, the claim at issue in this case was a purported state law claim for tortious interference with various labor contracts, including the CBA, the Grievance Resolution and the Amendment. The Fourth Circuit explicitly held in *Covenant Coal Corp.*, 977 F.2d at 897, that a state law claim for tortious interference with contract is preempted by LMRA Section 301 where the contract at issue was a labor contract. *See also Steinbach*, 253 F.3d at 540 (claim for tortious interference with labor contract preempted by LMRA Section 301); *Kimbro*, 215 F.3d at 727(same); *Hillard*, 774 F.2d at 887 (same).

In his Petition, Freeman quotes extensively from the *concurring* opinion in *Jackson* in support of his position. *See* Petition pp. 17-19 (quoting *Jackson*, 992 F.2d at 1327-28 (Phillips, J., concurring)). However, the Fourth Circuit has specifically rejected the reasoning of this concurrence in *Jackson* as inconsistent with its prior decision in *Covenant Coal Corp. See Shiflett v. I.T.O. Corp.*, No. 99-1379, 2000 U.S. App. LEXIS 263 (4th Cir. Jan. 20, 2000).

Based on its decision in *Covenant Coal Corp.*, the Fourth Circuit determined that it was "bound . . . by prior

controlling and unquestioned circuit precedent" and, therefore, held that Freeman's claim for tortious interference with contract was preempted and should be dismissed. *Freeman*, 114 Fed. Appx. at 535 (citing *Covenant Coal Corp.*, 977 F.2d at 897); Petition Appx. B at pp. 12b-13b. This decision was not in conflict with *Jackson* or any other decision by the Fourth Circuit.

V. THERE IS NO COMPELLING REASON FOR THIS COURT TO INVOKE ITS DISCRETIONARY AUTHORITY TO REVIEW THE FOURTH CIRCUIT'S DECISION.

In his Petition, Freeman argues that he will be left without a remedy if the Fourth Circuit's decision is not reviewed and reversed by this Court and, therefore, this Court should grant certiorari to correct this "unjust and harsh" result. (Petition pp. 15, 19-21). Freeman had remedies available to him but he did not pursue them.

For example, Freeman could have asserted a hybrid LMRA Section 301 claim against Duke and the Union at any time prior to the expiration of the six-month statute of limitations in January of 2000; however, he did not do so. Likewise, Freeman could have filed an unfair labor practice charge with the National Labor Relations Board regarding any alleged conduct by Thaxton and Kwascha; however, he did not do so.[2] *See Covenant Coal Corp.*, 977 F.2d at 899-900 (noting availability of unfair labor practice

[2] Both a hybrid LMRA Section 301 action and an unfair labor practice charge are subject to the six-month statute of limitations contained in 29 U.S.C. § 160(b). *See DelCostello*, 462 U.S. at 171, 103 S.Ct. at 2294.

charge to redress alleged interference with labor contract by third-party who was not a signatory of the labor contract). Freeman's failure to pursue the remedies available to him is not a compelling reason for this Court to invoke its discretionary authority to review the Fourth Circuit's decision.

Further, the Fourth Circuit correctly applied North Carolina law in concluding that Freeman's claim for unfair and deceptive trade practices failed to state a claim upon which relief could be granted. Any alleged error in the application of North Carolina law in this case fails to provide a compelling reason for this Court to invoke its discretionary authority to review the Fourth Circuit's decision.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted, this the 28th day of February, 2005.

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